IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-378

JAMES BROCKINGTON,

Petitioner,

—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

RAYMOND A. BROWN,
Counsel for Petitioner,
26 Journal Square,
Jersey City, N.J. 07306.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

Cases Cited

United States Constitution Cited

Statutes Cited

Rule Cited

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No.

JAMES BROCKINGTON,

Petitioner,

—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The Petitioner, James Brockington, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Superior Court of New Jersey, Appellate Division, entered in the above case on March 16, 1976. Certification was denied by the New Jersey Supreme Court on June 15, 1976.

Opinion Below

The opinion of the Superior Court, Appellate Division appears in the Appendix annexed hereto and has not been officially reported as yet.

Jurisdiction

The judgment of the Superior Court, Appellate Division, was entered on March 16, 1976. Certification was denied by the New Jersey Supreme Court on June 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and §1257(3).

Question Presented

Have Petitioner's rights to due process under the Fourteenth and Sixth Amendments been violated where Petitioner was illegally sentenced to a term in excess of the statutory maximum, and in excess of the contemplated plea bargain, and where, upon resentence after serving a portion of the original sentence, Petitioner was sentenced to a term in excess of the contemplated plea bargain under the Multiple Offender Statute?

Statutory Provisions Involved

Statutory provisions involved are N.J.S.A. 24:21-29; N.J.S.A. 24:21-24; N.J.S.A. 24:21-19(a)(1); N.J.S.A. 24:21-20; N.J.S.A. 24:21-19(a); R. 3:9-2; other statutory provision cited is Federal Rule of Criminal Procedure, 11.

Statement of the Case

Petitioner was charged in a four count indictment with conspiracy to violate the narcotics law of New Jersey, N.J.S.A. 24:21-24; distribution of cocaine, N.J.S.A. 24:21-19(a)(1); possession of cocaine, N.J.S.A. 24:21-20; and possession with intent to distribute, N.J.S.A. 24:21-19. At a *retraxit* hearing on September 11, 1974, Petitioner withdrew his plea of not guilty to the second count charging distribution of cocaine, at which time the State indicated it would dismiss the remaining counts of the indictment (Tr. 9/11/74, lines 2-5).

> ". . . It is a four count indictment, and it is my understanding that the defendant is going to plead guilty to the count charging him with distribution of cocaine.
>
> Court: What count would that be?
>
> Spivack: The second count, sir.
>
> Court: Just the second count?
>
> Spivack: Yes, sir. The remaining counts will be dismissed upon sentencing."

Subsequent to these remarks Judge Leopizzi examined the Petitioner (Tr. 9/11/74, lines 7-9).

> Court: Has anybody told you what the sentence will be?
>
> Brockington: Yes, sir.
>
> Court: Well, they told you what the maximum sentence would be, which for distribution is 12 years imprisonment or a $5,000.00 fine, is that correct?
>
> Brockington: Yes, sir.
>
> Court: But they didn't tell you what the Court was going to do?
>
> Brockington: No, sir.

Court: You only know that it is the maximum sentence in connection with Count 2, which you are pleading to?

Brockington: Yes, sir, that's what I am speaking of.

On December 17, 1974, the plea judge, the Honorable Bruno L. Leopizzi sentenced Mr. Brockington to a term of 18-20 years.

On January 24, 1975, the Petitioner moved before the Honorable Richard B. McGlynn for a reduction of the sentence. (By this time Judge Leopizzi had been reassigned to another county.) At the time of Petitioner's motion, Judge McGlynn agreed that Judge Leopizzi had imposed a sentence which illegally exceeded the statutory maximum and which improperly exceeded the terms of the plea bargain. Judge McGlynn also took the position that Mr. Brockington had the option of being resentenced (possibly under the Multiple Offender Statute) or of withdrawing the guilty plea. Counsel for Mr. Brockington insisted that the Petitioner was entitled to have the terms of his original plea bargain enforced. Judge McGlynn rejected this position.

On February 13, 1975, Judge McGlynn set aside Judge Leopizzi's sentence as illegal and violative of the terms of the plea bargain and ordered that the Prosecutor comply with the procedures of the Multiple Offender Act. At this time he renewed his offer to Petitioner to withdraw his guilty plea. At the time of this second *retraxit* hearing, the Prosecutor who had been present at the original *retraxit* hearing indicated that it was his perception, as well as that of the original sentencing court and the Petitioner that the maximum penalty contemplated at the time of the original plea bargain was 12 years (Tr. 2/13/75, lines 7-12).

Cerefice: Well, you see now, if you are going to ask me that question, as I was thinking about it at the time the sentence was imposed, I'd have to answer you that I did not look into the statute prior to my conversation with Judge Leopizzi and was under the impression that the maximum was 12."

On March 18, 1975 defendant was sentenced by Judge McGlynn to 18-20 years, pursuant to the Multiple Offender Act. (It should be noted that defendant was incarcerated from the time of his original sentencing by Judge Leopizzi on December 17, 1974 until the time of his sentencing on March 18, 1975 by Judge McGlynn.)

Reasons for Granting the Writ

The Superior Court, Appellate Division, has rendered a decision in conflict with the applicable decisions of this Court guaranteeing to the defendant a right to a fair trial. The Court has recently recognized the growing importance of "plea bargains" in the administration of justice. *Santobello* v. *New York,* 404 U.S. 257, 264, 30 L. Ed. 2d 430 (1971).

> "However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion, inasmuch as it constitutes a waiver of fundamental rights to a jury trial. *Duncan* v. *Louisiana,* 391 U.S. 145, to confront one's accusers, *Pointer* v. *Texas,* 380 U.S. 400, to present witnesses in one's defense, *Washington* v. *Texas,* 388 U.S. 14, to remain silent, *Malloy* v. *Hogan,* 378 U.S. 1, and to be convicted by proof beyond all reasonable doubt, *In Re Winship,* 397 U.S. 358." *Id.* at 264.

It is respectfully submitted that any waiver of such an imposing array of rights must be made accordingly and with full understanding of the *consequences* of such an act. Where a defendant argues that a sentence or disposition is contrary to that for which he had fairly bargained, then a court must carefully scrutinize the facts and circumstances which give rise to such a claim.

An initial step in such a scrutiny must be to determine what were the reasonable expectations of the defendant at the time he entered into the plea bargain. This principle has been unequivocally endorsed by the Supreme Court of the State of New Jersey. *State* v. *Thomas,* 61 N.J. 314 (1972).

In *Thomas* the New Jersey Supreme Court prohibited the State from proceeding against a defendant on a murder indictment after that defendant had served 18 months of a sentence pursuant to a plea of guilty to a charge of atrocious assault and battery on the same victim. The Court in *Thomas* rejected the appellant's plea of double jeopardy. However, it prohibited the State from proceeding with the indictment on the theory that to do so would violate the defendant's reasonable expectations that his plea to assault and battery and serving of the subsequent sentence imposed would discharge his obligation to the State.

> "From an examination of the record made upon remand, we are convinced that the defendant anticipated that by pleading guilty to the atrocious assault and battery, and then serving whatever sentence might be imposed, he was terminating the incident and could not thereafter be called upon to account further. We think that under all of the circumstances, that this expectation was entirely reasonable and justified." *Id.* at 323.

Two years prior to the *Thomas* decision, the Superior Court, Appellate Division, had embraced a similar principle with respect to those expectations of a defendant which were generated by the comments of a trial judge. *State* v. *Poli,* 112 N.J. Super. 374 (App. Div. 1970),

> "The pertinent issue is whether defendant had a bona fide belief that such a promise was made, and whether that belief was reasonably based upon the conduct of all the parties concerned, including the plea judge." *Poli,* supra, at 380. (Emphasis supplied.)

Petitioner Brockington maintains that the sentence of 18-20 years initially imposed illegally by Judge Leopizzi and subsequently imposed pursuant to the Multiple Offender Act by Judge McGlynn unfairly violated his reasonable expectations concerning the maximum sentence which might be imposed upon him pursuant to his plea bargain. Petitioner Brockington furthermore requests that the Court order "specific enforcement" of the terms of the original plea bargain.

There is ample precedent for the proposition that a defendant is entitled to specific enforcement of the original terms of his plea bargain, where there has been a failure to meet his reasonable expectations. Chief Justice Burger in speaking for the Court in *Santobello* indicated that the options available for the Court in that case would be to vacate the sentence in accordance with the wishes of the Petitioner, or to order that the original terms of the plea bargain, envisioned by the defendant and the original prosecutor, be specifically enforced. The majority chose, however, to remand the matter to State court with directions that the State court should make the appropriate choice between these two options, *Santobello,* supra, at 263. In his concurring opinion, Justice Douglas agreed

with the Chief Justice's analysis of the options available and with the decision to remand to the New York court. However, Justice Douglas felt that the sentencing court should:

> "Afford defendant's preference considerable if not controlling weight . . ." *Santobello*, supra. at 267.

The concurring and dissenting opinions of Justices Marshall, Brennan and Stewart agreed with the majority and with Justice Douglas that the available options were vacation and specific performance. The dissenting justices apparently chose to defer Petitioner's request that the sentence be vacated and the matter remanded for trial.

The view that specific performance is a viable and just remedy in cases like those *sub judice*, is reinforced by the ultimate decision arrived at by the New York Court of Appeals in *Santobello*, *People* v. *Santobello*, 39 A.D. 2d 654, 331 N.Y.S. 2d 776 (1972):

> "Here, due process and the interest of justice will be fully served by a remand for resentence with the specific performance of the prosecutor's promise." *People* v. *Santobello*, supra, 777.

On the validity of the specific performance, see also *United States* v. *Graham*, 325 F. 2d 922 (6th Cir. 1963); *State* v. *Thomas*, supra; *State* v. *Poli*, supra; *People* v. *Selikoff*, 41 A.D. 2d 376, 343 N.Y.S. 2d, 386, aff'd. 36 N.Y. 2d 227 (1974); *People* v. *Smith*, 34 A.D. 2d 687, 306 N.Y. 2d 182 (1969); *Courtney* v. *State*, 341 Pa. 2d 610 (Okla. Cr. App. 1959).

Specific performance is a remedy available to a defendant whose reasonable expectations have been thwarted by a sentence or disposition contrary to the terms of the original plea bargain. Specific performance is a preferred remedy where a defendant has changed his position in reliance upon, or partial fulfillment of the terms of the original plea bargain (on reliance as a factor in determining the appropriateness of specific performance, see *Santobello*, supra, at 268, dissenting and concurring opinion; *Hicks* v. *United States*, 19 Cr. Law. Rptr. 2460, 8/9/76 —— U.S.D.C. Ct. Appeals ——; *People* v. *Selikoff*, supra.)

The majority of the N. Y. Court of Appeals in *Selikoff* denied the defendant's request for specific performance of a promise made at a *retraxit* hearing precisely because there had been no change in the defendant's position in reliance on the original terms of the plea bargain:

> "The absence of any showing of specific prejudice to the defendant, or change of position in reliance upon the guilty plea and none has been demonstrated in this record, he is in no position to object to this procedure (vacation and trial.)" *Id.* at 392.

Interestingly enough, the dissenter in *Selikoff* disagreed with the Court's conclusion, but was in accord on the principle that some change in the defendant's position in reliance on the original promise is the principal criteria for determining the applicability of specific performance:

> ". . . [R]eturning to the *status quo ante* is impossible in this case where co-defendants of this defendant have been tried and acquitted in the interim, and the defendant himself has waived his constitutional right against self-incrimination and has made a full disclosure of his involvement in the crime to the prosecuting attority and the police department . . . Thus, in reliance upon the Court's promise, he at the time and subsequently laid bare all the facts pointing to his culpability." *Id.* at 393.

State v. *Thomas*, supra, also stands firmly for the proposition that a defendant's reasonable reliance upon the original terms of the plea bargain should be given great weight in determining whether or not he is entitled to specific performance of that plea bargain. In the instant case, Petitioner Brockington was incarcerated from the time of his original sentencing on December 17, 1974 to the time of his sentencing by Judge McGlynn on March 18, 1975. Thus, he had served 12 weeks before he was finally given a legal sentence by Judge McGlynn. It would certainly be unfair to suggest that Mr. Brockington was faced with a reasonable choice, when he was told that he could withdraw his guilty plea and go to trial, after having served a portion of his sentence pursuant to the plea bargain. Certainly, he, like the defendant in *Thomas*, was under the apprehension that serving this time would be a manner of resolving all questions concerning his punishment. This apprehension was clearly the result of the reasonable expectations generated at the time of the original plea:

> "Court: Has anybody told you what the sentence will be?
>
> Defendant: Yes, sir.
>
> Court: Well, they told you what the maximum sentence would be, which for distribution is 12 years and/or a $5,000.00 fine. Is that correct?
>
> Defendant: Yes, sir.
>
> Court: But they didn't tell you what the Court was going to do?
>
> Defendant: No, sir.
>
> Court: You only know that it is the maximum sentence in connection with Count 2, the count you are pleading guilty to?
>
> Defendant: Yes, sir. That's what I am speaking of."

Thus, the defendant retracted his not guilty plea, entered a plea of guilty and subsequently began serving two months of his sentence as a consequence of his reliance on the statement of Judge Leopizzi that the maximum which could be imposed upon him was 12 years. Petitioner's plea of guilty was induced by what was in effect a misstatement of law applicable to him. (Irreparable damage was done when he was forced to serve a portion of his sentence before being given the opportunity to withdraw his guilty plea.) The failure to correctly inform the defendant of possible consequences of his guilty plea is clearly in violation of N.J. Court Rule R. 3:9-2 concerning the entry of guilty pleas. This rule requires that a court find that a guilty plea is entered voluntarily and "with an understanding of the nature of the charge and consequences of the plea."

An understanding of the consequences necessarily includes a knowledge of what sentences might be imposed as a result of a plea to the charge before the Court. See, *State* v. *Poli*, supra:

> "Finally, since no one indicated to defendant that such an additional sentence would be imposed as a result of his pleas, it is spurious to argue that such additional sentenced were outside the scope of his agreement. The basis of the probation violation was the guilty pleas, and without the pleas, there were no such violations. By reason thereof, fair play requires that the sentence for the violations of probation be made concurrent to the Middlesex County sentence." *Id.* at 381.

The decision in *Poli* was addressed to the actions of a trial court which sentenced a defendant on substantive crimes and consequent violations of probation. The probation violations which were factually the same, were

made to run consecutive with the substantive violations, contrary to the defendant's understanding of the trial judge's comments. In effect, *Poli* held that the consecutive sentence for violations of probation were consequences of his plea to the substantive crimes. Since the defendant's guilty plea was induced by a reasonable expectation that all of his sentences were to be concurrent, based on comments of the trial judge, the Appellate Division ordered that all his sentences be made concurrent to conform to his original understanding.

Clearly, the thrust of R. 3:9-2 is to protect the defendant from the imposition of sentences greater than those contemplated at the time of his original guilty plea. (Sentences under the Multiple Offender Statute here utilized are not for a substantive offense, but are additional sentences for the original offense. *State* v. *Staten*, 62 N.J. 935 (1943); *State* v. *Tyler*, 88 N.J. Super. 396 (1968), cert. den. 384 U.S. 992.) This interpretation of the Rule is buttressed by the tentative draft comment to the Rule which compares R. 3:9-2 to "the analagous Federal rule." *Pressler, Current N.J. Court Rules*, Tentative Draft Comment, R. 3:9-2. Federal Rule of Criminal Procedure 11(c)(1) specifically requires the trial court to advise a defendant who wishes to plead guilty of "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." For a similar interpretation of a statute requiring that a defendant be advised of a possible additional sentence which could be imposed after entering a guilty plea, see *People* v. *Schulman*, 13 E.D. 2d 441, 216 N.Y.S. 2d 998 (1961) interpreting *New York Code of Criminal Procedure, Section 335.A.* See also, *Gannon* v. *United States*, 208 F. 2d 772 (1953).

There were two crucial lapses in due process which caused harm to Petitioner in the procedures below. The first was the failure to warn Petitioner of a possible additional sentence which might be imposed after a plea to Count 2 of the indictment in question. The second was the fact that there was an excessive sentence imposed by Judge Leopizzi on September 17, 1974, also resulting in Petitioner's spending time for a term illegally and improperly imposed. It is Petitioner's contention that the question of culpability is irrelevant. The fact is that Petitioner suffered prejudice solely as the result of his reliance on his reasonable expectation generated at the time of his original plea bargain.

The failure of the court or the state to protect the Petitioner's right in either of these situations constitute a clear violation of Petitioner's Fourteenth Amendment right to due process. The failure of Petitioner's own counsel to warn him of the possible additional sentence served to deny Petitioner's Sixth Amendment right to effective representation by counsel as guaranteed by the Fourteenth Amendment. Furthermore, failure of Petitioner's counsel to object at the time of the imposition of the illegal sentence, causing Petitioner to serve time before he could be afforded an opportunity to withdraw his guilty plea, constituted a denial of Petitioner's Sixth and Fourteenth Amendment rights. See also, *Schulman* and *Gannon*, supra.

Petitioner originally entered his guilty pleas to Count 2 of the indictment with the understanding that the maximum penalty which could be imposed was 12 years imprisonment. This understanding was clearly shared by both Judge Leopizzi and the Assistant Prosecutor. The record is bereft of any mention at that time of the Multiple Offender Statute for narcotics violators by the state or the court.

This reasonable expectation of Petitioner was clearly subverted by Judge Leopizzi's illegal sentence. The opportunity afforded Petitioner by Judge McGlynn to withdraw his guilty plea was manifestly unfair since Petitioner had already begun to fulfill his part of the original plea bargain and could not be returned to the *status quo* for purposes of a trial.

To affirm Judge McGlynn's subsequent "legitimization" of the original sentence would be to elevate form over substance and to allow Petitioner's Fourteenth Amendment right to due process to be violated. It would also undermine the plea bargining process by casting a shadow over the procedures which resulted in the waiver of important constitutional rights.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Superior Court of New Jersey, Appellate Division.

RAYMOND A. BROWN
Attorney for Petitioner

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—A-2319-74

STATE OF NEW JERSEY,
Plaintiff-Respondent,

—v—

JAMES BROCKINGTON,
Defendant-Appellant.

Submitted March 1, 1976.

Decided March 16, 1976.

Before Judges Carton, Crahay and Handler.

On appeal from Essex County Court.

Messrs. Brown, Vogelman & Ashley, attorneys for appellant (Mr. Raymond M. Brown & Mr. Thomas R. Ashley, on the brief).

Mr. Joseph P. Lordi, Essex County Prosecutor, attorney for respondent (Mr. Steven Isaacson, Assistant Prosecutor, of counsel).

PER CURIAM

Appendix A

In a four count indictment defendant was charged with 1) conspiracy to violate the narcotic laws—N.J.S.A. 24:21-24; 2) distribution of cocaine—N.J.S.A. 24:21-19(a)(1); 3) possession of cocaine—N.J.S.A. 24:21-20, and 4) possession of cocaine with the intent to distribute it—N.J.S.A. 24:21-19(a). Pursuant to a bargained plea, defendant pled guilty to the offense of distributing cocaine. The remaining counts were dismissed and defendant was sentenced to an 18 to 20 year term at New Jersey State Prison.

Defendant, 43 years of age, suffered an extensive criminal record. The transaction here involved the sale of 70 plus grams of cocaine to a police undercover agent for $1,850.

The sentence imposed was illegal, the maximum statutory penalty for the offense being 12 years. At the sentencing hearing the prosecution stated it was urging that the maximum sentence be imposed. At the *retraxit* hearing the trial court had stated to defendant that the maximum sentence was 12 years.

Defendant thereafter moved to have the sentence reduced. The trial judge (one other than the original sentencing judge who had been transferred to another county) advised defense counsel that he would permit defendant to withdraw his plea of guilty and stand trial on the indictment. Defendant persisted in the claim that he was entitled to be sentenced to a prison term with a maximum of 12 years. It was stated that the original sentencing judge did not indicate whether defendant was being sentenced as an habitual offender. The trial court stated that it was not bound by any plea bargaining agreement and that in such a posture defendant had the opportunity to withdraw the plea and stand trial.

Appendix A

The court below concluded that if the original sentencing judge intended to punish defendant in excess of the statutory maximum, as a multiple offender, he did not accord defendant the due process safe-guards called for by *State* v. *Booker*, 88 N.J. Super. 510 (App. Div. 1965) *i.e.*, notice of, and opportunity to be heard on prior offenses before suffering enhanced penalty. The original sentence was set aside as illegal. Defendant chose not to withdraw his guilty plea and was later served with an accusation charging him under N.J.S.A. 24:21-29 with two prior convictions—

I. In 1962, in the United States District Court for the District of New Jersey, for violation of 26 U.S.C.A. 4744(a), the unlawful possession of marijuana without payment of the required federal transfer tax for which he received a four year federal prison term;

and

II. In 1959, in the Essex County Court, for violation of N.J.S.A. 24:18-4, the unlawful possession of cocaine for which he was sentenced to a term of two to three years.

Defendant personally waived his right to a jury trial on the accusation and was found guilty of being an habitual offender thereby exposing him to a 24 year maximum prison term.

A sentence of 18 to 20 years in State Prison was ordered. On this appeal, defendant does not challenge his conviction as a subsequent offender but asserts solely that—

Appendix A

> The original plea bargain entered into by defendant and the prosecutor should be specifically enforced under the terms originally agreed upon.

Our review of defendant's arguments against the record satisfies us that there was no illegality in the procedure employed nor basic unfairness to defendant warranting reversal and we affirm.

First, for the purposes of our disposition, we assume —the record is not absolutely clear on the point—that there was in fact an agreement that in exchange for defendant's guilty plea the prosecution would move to dismiss the balance of the indictment and specifically recommend a maximum sentence of 12 years. We will further assume that the defendant, the prosecution, and the trial judge at the time of the *retraxit* hearing did not contemplate employment of the subsequent offender act—N.J.S.A. 24:21-29. Thus for the purposes of squarely addressing the issue, at the close of the *retraxit* hearing we view that the defendant contemplated that the State had unequivocally agreed that his maximum sentence would be limited to not more than 12 years. Must such an agreement be specifically enforced? We are satisfied not only that it need not be but that on this record such a step might have been counterindicated.

Defendant essentially seems to argue that upon the acceptance of his plea at the *retraxit* hearing he then enjoyed an inalterable vested right to a sentence not exceeding 12 years, the statutory maximum, and that being so, there could not have been any further consideration of possible subsequent offender treatment. We know of no decisional mandate to this end nor do we perceive any reasonable basis, on this record, for adopting it. Defendant suffered no fundamental unfairness. The public interest was also to be served.

Appendix A

Plea bargaining in criminal matters is a significant tool in the administration of justice and has been encouraged. *Santobello* v. *New York*, 404 U.S. 257 (1971). The terms of plea agreements must be meticulously adhered to and a defendant's reasonable expectations generated by plea negotiations should be accorded deference. *State* v. *Jones*, 66 N.J. 524 (1975); *State* v. *Thomas*, 61 N.J. 314 (1972) and *State* v. *Poli*, 112 N.J. Super. 374 (App. Div. 1970). It does not follow from these principles that a defendant may insist that he has a right to a stated term of years imprisonment on the grounds that a judge at a *retraxit* or plea hearing indicated that such a term represented defendant's total penal exposure.

Defendant cites *Santobello, supra*. to us, but that authority does not support his claim. Here, there was no breach of any agreement by the State. The subsequent offender action leading to the sentence here challenged was initiated by the court. Unlike *Santobello*, the prosecutor in this matter did not promise not to make any recommendation as to the *quantum* of sentence and thereafter breach such a promise.

The highest authority instructs that there is no absolute right to have a plea accepted and sound discretion may lead to the rejection of such a plea. *Santobello, supra* at 262. *State* v. *Thomas, supra*, at 321. R. 3:9-3(d).

It is the sentencing judge, exercising sound discretion, who in each case must decide in which way the public interest will best be served. *State* v. *Tyson*, 43 N.J. 411 (1964), *cert.* den. 380 U.S. 987 (1965); *State* v. *Ivan*, 33 N.J. 197, 201 (1960).

Appendix A

One reason for permitting wide discretion in the sentencing judge is that at the time a plea is entered ordinarily the court has before it only the offense. A fuller picture of the offender does not emerge until sentencing when the court has had the benefit of a defendant's presentence report. R. 3:21-2; *State* v. *Culver,* 40 N.J. Super. 427 (App. Div. 1956), modif. 23 N.J. 495 (1957), *cert.* den. 354 U.S. 925 (1957).

We are satisfied that if the court be bound to a plea agreement, regardless of what a defendant's presentence report reflects, there would exist a real potential that the public interest would be disserved.

We do not know what impelled the original sentencing judge to order a term of incarceration in excess of the statutory maximum. It might very well be that the action was taken, after reviewing defendant's presentence report, with the mistaken notion that, without more, the subsequent offender's statute was employable.

We iterate that defendant suffered no prejudice in the procedure followed. He had no vested interest in the plea agreement not yet approved by a court. He had the opportunity to withdraw the plea and stand trial. He chose not to do so knowing that his penal exposure would be doubled if adjudged guilty as a subsequent offender. N.J. S.A. 24:21-29. The court below acted with full warrant based upon its review of defendant's presentence report. That document is a sorry one. Defendant's adult court history, in addition to the two prior narcotics convictions, dates back to 1949. There are many other arrests, convictions and imprisonments for offenses other than narcotics violations. We cannot say that the trial court mis-

Appendix A

takenly used its discretion in not accepting the plea agreement as offered by defendant and ordering subsequent offender prosecution. On this record the stringent sentence ultimately imposed was not, in our view, unduly punitive.

Affirmed.

APPENDIX B

Order of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
C-646 SEPTEMBER TERM 1975

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

JAMES R. BROCKINGTON,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied—with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 15th day of June, 1976.

FLORENCE R. PESKOE
Clerk

FILED
Jun 15 1976

FLORENCE R. PESKOE
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-378

JAMES BROCKINGTON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

JOSEPH P. LORDI,
Essex County Prosecutor,
Attorney for Respondent,
Essex County Courts Building,
Newark, New Jersey 07102.
(201) 961-7470

R. BENJAMIN COHEN,
Assistant Prosecutor,
Of Counsel and
on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

Cases Cited

Statutes Cited

United States Constitution Cited

United States Supreme Court Rule Cited

New Jersey Rule of Court Cited

Other Authority Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-378

JAMES BROCKINGTON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Statement of the Case

Petitioner seeks a writ of certiorari to review judgments entered in the Appellate Division of the Superior Court of New Jersey on March 16, 1976, affirming peti-

tioner's conviction and sentencing conducted by the Law Division of the Superior Court of New Jersey. (The Appellate Division decision is reported at 140 N.J.Super 422 (App.Div.1976), 356 A.2d 430).

On June 15, 1976, the Supreme Court of New Jersey denied certification.

Petitioner was originally charged in a four count indictment with conspiracy to violate the narcotics law of New Jersey (N.J.S.A. 24:21-24); distribution of cocaine, (N.J.S.A. 24:21-19(a)(1)); possession of cocaine, (N.J.S.A. 24:21-20); and possession of cocaine with intent to distribute, (N.J.S.A. 24:21-19). At a retraxit hearing on September 11, 1974, petitioner pleaded guilty to Count 2, distribution of cocaine, in return for the State's recommendation for dismissal of the other three counts. At the time the plea was accepted by the Honorable Bruno L. Leopizzi, J.S.C., the State, the petitioner, and the Court were all apparently under the impression that the maximum time petitioner could be sentenced to was twelve years (TP6-12 to 25).*

However, on December 17, 1974, Judge Leopizzi sentenced the petitioner to a term of eighteen to twenty years (TS9-2 to 4).

On January 24, 1975, petitioner moved before Judge McGlynn** for a reduction of sentence. The Court concluded that in light of the fact that petitioner had been told at the time he entered his plea of guilty that the maximum sentence that could be imposed was twelve years, he would be given the opportunity to withdraw his guilty plea and stand trial (TM2-1 to 10). However, defense counsel rejected this opportunity and demanded that petitioner be resentenced to no more than the twelve year maximum. The Court refused, noting that the sentencing judge had the right to reject a plea bargain, and in light of petitioner's previous criminal record, the Court found it would be in the interest of justice to sentence petitioner under the Multiple Offender Statute if he pleaded guilty or pleaded not guilty and was convicted after a trial. Sentencing was then deferred by Judge McGlynn until February 13, 1975.

On February 13, 1975, the State reaffirmed its position that petitioner should be sentenced to the maximum term provided by law. The State did not recommend that the Court proceed under the Multiple Offender Statute but Judge McGlynn proceeded under his discretion as sentencing judge. The Court again offered petitioner the opportunity to withdraw his plea of guilty. The petitioner rejected this offer but objected to being sentenced as an habitual offender. Judge Leopizzi's sentence was then set aside by Judge McGlynn (TPH27-21 to TPH28-25).

On March 18, 1975, petitioner was tried under an accusation which charged the defendant with being a second offender. The defendant waived his right to a jury trial. Judge McGlynn found the defendant guilty and imposed a sentence of eighteen to twenty years in the New Jersey State Prison (TSH36-3 to 7).

On appeal the Superior Court, Appellate Division, affirmed the conviction and sentence on March 16, 1976. On June 15, 1976, the Supreme Court of New Jersey denied petitioner's petition for certification.

---

* "TP" refers to transcript of original plea, September 11, 1974. "TS" refers to transcript of original sentencing, December 17, 1974. "TM" refers to transcript of motion to reduce sentence, January 24, 1975. "TPH" refers to transcript of proceedings, February 13, 1975. "TSH" refers to transcript of accusation trial and sentence, March 18, 1975.

** Judge Leopizzi had been transferred to Passaic County.

REASONS FOR DENYING THIS WRIT

POINT ONE

The federal question presented herein was either not presented below or was not properly presented below.

It is essential to the jurisdiction of this Court under 28 U.S.C. §1257 that a substantial federal question has been properly raised in the state court proceeding below. See Wiener, "Wanna Make a Federal Case Out of It?" 48 A.B.A.J. 59, 60-61 (1962). There are two basic requirements of particularity in the proper framing of a federal question. First, the question must make reference to a particular clause of the federal Constitution relied upon, as well as the rights claimed thereunder. Second, the jurisdiction of this Court cannot arise from mere inference but only from averments so distinct and positive as to place it beyond question that a party intended to assert a federal right. *Oxley Stove Company* v. *Butler County,* 166 U.S. 648, 655 (1897). The question petitioner attempts to raise has not met these standards.

At no point at the trial level did petitioner assert any federal grounds for specific performance of his plea bargain. "Due process" was never mentioned; neither were any specific references made to the United States Constitution and petitioner's rights thereunder. The Superior Court, Appellate Division, affirmed the conviction on state law grounds; the state courts did not touch on federal issues which were not raised by petitioner until he petitioned this Court for a Writ of Certiorari. Thus, petitioner's claim comes too late. "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is

not discretionary but jurisdictional". *Amalgamated Food Employees Union* v. *Logan Valley,* 391 U.S. 308, 334 (1968) (dissent). As Rule 23(1)(f) of this Court states, a petitioner seeking review of a state court decision must "specify the stage of the proceedings in the court of the first instance and in the appellate court at which, and the manner in which the federal questions sought to be reviewed were raised . . ." At no place in his Petition does petitioner make such a specification.

POINT TWO

The decisions below were predicated on the well established principle that the sentencing judge is not bound by plea agreements between the prosecutor and defense counsel, and where the sentencing judge gave petitioner the opportunity to withdraw his guilty plea after refusing to enforce the plea bargain, petitioner's rights to due process under the Fourteenth and Sixth Amendments were not violated.

The petitioner asserts that he is entitled to specific performance of the terms of a plea agreement which he claims was entered into by defense counsel and the prosecutor. This claim is made in spite of the fact that Judge McGlynn offered petitioner the opportunity to withdraw his guilty plea on several occasions, prior to sentencing. Petitioner insisted below and continues to insist that, because Judge Leopizzi stated that the maximum sentence to be imposed would be twelve years at the taking of the plea of guilty, he acquired a vested right to have his guilty plea accepted with the proviso that his sentence not exceed twelve years.

The State recognizes that "the terms and conditions of a plea bargain must be meticulously carried out," *State* v. *Jones*, 66 N.J. 524, 525-526 (1975), 333 A.2d 529, 530-531, and that a defendant's reasonable expectations engendered by a plea bargain have been accorded considerable deference. See *State* v. *Thomas*, 61 N.J. 314, 323-324 (1972), 294 A.2d 57, 61-62; *State* v. *Poli*, 112 N.J. Super. 374, 380 (App. Div. 1970), 271 A.2d 447, 450. However, the State submits that there are significant policy considerations which operate to preclude a defendant from insisting that he has a right to a particular term of years merely because the judge at the taking of the plea indicated that a specific term of years was the maximum sentence to which defendant was exposed. Furthermore, the decision rendered by the Superior Court, Appellate Division, conforms to the applicable decisions of this Court in regard to due process in the area of plea agreements.

Initially, it should be noted that this case does not involve a breach of a plea bargain by the State. Unlike the prosecutor in *Santobello* v. *New York*, 404 U.S. 257 (1971), the State did not agree to make any recommendation as to the number of years to be imposed. On the contrary, the State consistently took the position that the petitioner should receive the maximum number of years provided by law. The petitioner was told originally by Judge Leopizzi that he would be exposed to a maximum of only twelve years. However, the State initiated no action which would subject the petitioner to treatment as a multiple offender. The State was as surprised as the petitioner to hear Judge Leopizzi's sentence of eighteen to twenty years. The sentence imposed by Judge Leopizzi was illegal; it was a nullity, and for all intents and purposes Judge McGlynn was sitting as the sentencing judge when petitioner moved to have his sentence reduced. The State submits that Judge McGlynn, at this juncture in

the proceedings, had the power to accept or reject any plea. In the exercise of his discretion he determined that the petitioner should be treated as a multiple offender, and, because petitioner had not been advised of this possibility when he entered his plea of guilty before Judge Leopizzi, Judge McGlynn offered the petitioner the opportunity to withdraw his plea. Petitioner refused to accept this offer, arguing that Judge McGlynn was bound by Judge Leopizzi's statement at the taking of the plea to the effect that petitioner's maximum exposure was twelve years.

This Court has stated on several occasions that there is no right to have a guilty plea accepted, and a court in the exercise of its sound discretion may reject such a plea. *Santobello* v. *New York*, *supra*, 404 U.S. at 262; *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); *United States* v. *Jackson*, 390 U.S. 570, 584 (1968).

See also New Jersey Rules of Court, R. 3:9-3(d) which provides:

> If at the time of sentencing the judge determines that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel, the defendant shall be permitted to withdraw his plea.

As noted by the Ninth Circuit Court of Appeals, strong policy considerations favor this type of procedure:

> . . . a fundamental and essential element of the administration of criminal justice is that the judge will have the ultimate responsibility in passing sentences unfettered by improper influence and based upon his objective determination, guided by his wisdom and conscience. To shackle him with manda-

tory enforcement of agreements between counsel would result in a dangerous inroad in our system of justice. *United States* v. *Hernandez*, 471 F.2d 1209, 1210 (9th Cir. 1972).

According to petitioner, a sentencing judge would be foreclosed from rejecting a plea bargain even where the judge has discovered after accepting the plea that the defendant has had prior involvement with the criminal law. Thus, a defendant by entering a guilty plea could effectively insulate himself from treatment under a multiple offender statute. The State submits that this is not only contrary to the well-settled principle that sentencing falls within the judge's discretion, but also frustrates the legislative policy embodied in the multiple offender statutes.

Petitioner asserts that the Superior Court, Appellate Division's decision runs counter to this Court's decision in *Santobello* v. *New York, supra.* However, a closer reading of that case finds both courts in agreement on the principles of due process with regard to plea agreement procedures. In *Santobello,* the defendant pleaded guilty to one count on the district attorney's promise that he would make no sentence recommendation. At sentencing a new district attorney asked that the maximum sentence be imposed, and the sentencing judge imposed such a sentence, in disregard of the earlier plea agreement. Moreover, the sentencing judge refused to allow the defendant to withdraw his guilty plea. This court vacated the sentence and remanded the case back to the State court to determine whether in those circumstances defendant should be allowed to withdraw his plea or whether the court should simply resentence him with no recommendation from the State. In vacating that sentence, this court reaffirmed that a sentencing judge may reject a plea bargain. Under the circumstances of *Santobello,* however, the plea agreement was breached by the State, and the sentencing judge did not give the defendant the opportunity to withdraw his plea. In the instant case Judge Leopizzi, on his own initiative, sentenced petitioner illegally. That sentence was voided by Judge McGlynn, who, exercising his proper discretion, rejected the original plea agreement and gave petitioner the opportunity to withdraw his plea.

The instant case is analogous to *People* v. *Selikoff*, 41 A.D. 2d 376, 343 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974) *cert.* den. 419 U.S. 1122 (1975). In that case defendant pleaded guilty to grand larceny and obscenity on the Court's opinion that no incarceration would be necessary. However, at sentencing, the judge informed the defendant that because of information he had received he could no longer in the interest of justice, abide by the agreement. The judge offered defendant an opportunity to withdraw his plea. Defendant's counsel refused this offer, and demanded specific performance of the court's promise of no incarceration. The court thereupon imposed a five year sentence on the grand larceny plea and a fine on the obscenity plea. In affirming the conviction the Appellate Division of the Supreme Court of New York stated . . . "there cannot be an absolute sentence promise by the court at the time of acceptance of a guilty plea, as that would violate a statutory mandate and a public policy" . . . "If the Court has in fact made a specific sentence promise to a defendant at the time of a guilty plea which it cannot thereafter fulfill, it is perfectly fair and proper for the court to offer the defendant the opportunity to withdraw his plea, as was done at bar and restore him to his prior position."

In *People* v. *Johnson*, 10 Cal. 3d 868, 112 Cal. Rptr. 556, 519 P.2d 604 (1974), the California Supreme Court held that the failure to advise the defendant of his right

to withdraw his guilty plea constituted error, when the trial judge rejected a plea agreement at sentencing. The California Supreme Court refused to order specific enforcement of the original plea bargain, noting:

> . . . "The instant case, involving serious misrepresentations by the defendant, reinforces our reluctance to create a right to specific performance of a plea bargain whenever the court has failed to advise a defendant of his right under (Calif. Penal Code) section 1192.5. We think it is sufficient, in such a case, to require the court to provide defendant with an opportunity to withdraw his plea . . ." 519 P.2d at 607.

The State submits that the above cases are in line with this Court's decision in *Santobello* and the instant case. There is no conflict of decisions here which would merit the attention of this Court. There is no precedent on the federal or state level for specific performance of a plea bargain. It is deeply engrained in the jurisprudence of New Jersey that the sentencing decision lies within the sound discretion of the sentencing judge. The power and duty to sentence resides in the trial judge. *State* v. *Kaufman*, 18 N.J. 75, 83 (1955), 112 A. 2d 721, 725, and he is to act in the public interest in imposing sentence. *State* v. *Ivan*, 33 N.J. 197 (1960), 162 A.2d 851. To grant the petitioner the relief which he seeks would be to subvert the judicial prerogative and place the sentencing power in the hands of defense counsel and the prosecutor.

Petitioner's reliance on *State* v. *Thomas, supra*, and *State* v. *Poli, supra*, is misplaced. In the *Thomas* case, the defendant was charged with atrocious assault and battery, assault with intent to rob, and robbery. Pursuant to a plea bargain, the defendant pled guilty to

atrocious assault and battery in exchange for dismissal of the other charges. The defendant was sentenced to an indeterminate term. The victim of the atrocious assault and battery subsequently died and the defendant was indicted for murder some ten months after the sentence was imposed. While holding that it would not be a violation of the Double Jeopardy Clause to try the defendant for the murder of the victim, the Supreme Court of New Jersey ruled that the murder indictment should be dismissed under the circumstances of the case. The court stated: "It is . . . important to assure a defendant that *after the agreement has received final judicial sanction*, it will be carried out according to its terms." 294 A.2d at p.61 (emphasis added). The court found that by pleading guilty to the atrocious assault and battery charge, and by serving the sentence that was imposed, the defendant entertained a reasonable expectation that the incident was terminated and he "could not thereafter be called upon to account further." *Id.* at p.62. On the other hand, the State, by attempting to prosecute the defendant for murder was "doing violence to its agreement and [was] seeking to deprive the defendant of something for which he legitimately bargained." *Id.* Since the defendant had already served eighteen months of an indeterminate term and had been released from custody on parole, the Court concluded:

> To vacate the plea in this case would be unjust to the defendant who has already been punished for the crime to which he confessed. As to him the status quo cannot be resumed. *Id.* at p. 62;*Id.* at p. 324.

Unlike the situation presented in the *Thomas* case, the plea bargain in the instant case never received final ju-

dicial sanction. Judge Leopizzi certainly cannot be said to have accepted it, for he sentenced the petitioner to a term beyond its terms. Judge McGlynn expressly rejected it. Judge McGlynn did offer to put petitioner back to the status quo, but petitioner refused this offer. The fact that petitioner was incarcerated for eight weeks under the illegal sentence is not such a denial of "due process" that the status quo could not be returned to petitioner. Had Judge Leopizzi offered petitioner the right to withdraw his plea and had petitioner accepted, it is highly likely that Judge Leopizzi would have ordered incarceration, since petitioner had committed another crime while on bail pending sentencing (TS8-3 to 9). And since Judge McGlynn counted petitioner's pre-sentencing incarceration time in determining the sentence, petitioner suffered no substantial harm. The question presented does not involve a breach by the State of its agreement as in the *Thomas* case, but rather a judicial refusal to accept the bargain. The *Thomas* case expressly recognized the sentencing judge's power to reject a plea bargain. 294 A.2d. at p.61.

In *State* v. *Poli, supra*, the defendant pleaded guilty to five separate indictments charging him with obtaining money under false pretenses. The plea was made pursuant to an agreement between defense counsel and the judge that the sentence would run equally and concurrently to whatever sentence the defendant might receive on charges then pending in another county. A three to five year sentence on the charges pending in the other county was subsequently imposed. A different judge sentenced defendant to serve five to eight years on the five indictments. On appeal the Appellate Division of the Superior Court of New Jersey found that the defendant actually and in good faith did have a bona fide belief in

the agreement when he entered his guilty pleas and therefore the plea was not voluntarily entered. The Court modified the sentence to conform to the original plea. *Id.*

The State submits that the petitioner herein, unlike the defendant in *Poli,* did not in good faith entertain a reasonable expectation that his sentence would not exceed twelve years. The petitioner was aware or should have been aware that the judge would eventually be informed of his prior record when the judge received petitioner's pre-sentence report. In such a situation the most that can be said is that the petitioner entertained a hope that the judge, in his discretion, would not deem it advisable to have the petitioner treated as a multiple offender. The State submits that this was not a reasonable belief.

The record is unclear as to why petitioner's counsel did not object at the time Judge Leopizzi imposed his sentence. Nevertheless, his prompt motion for post-conviction relief and Judge McGlynn's voiding of the original sentence negates petitioner's claims of a denial of Sixth and Fourteenth Amendment rights. Petitioner was offered the opportunity to withdraw his plea and stand trial. His refusal does not entitle him to specific performance.

CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH P. LORDI
Essex County Prosecutor
Attorney for Respondent

By R. BENJAMIN COHEN
Assistant Prosecutor

THEODORE J. METZGER
Law Clerk